Supreme Court, U.S.
FILED
DEC 28 1985
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(3)

No. 85-934

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM B. SHOCKLEY

Petitioner,

vs.

COX ENTERPRISES, INC., and
ROGER WITHERSPOON,

Respondents.

BRIEF OF RESPONDENTS, COX ENTERPRISES, INC. AND ROGER WITHERSPOON, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Plaintiff, who did not file a motion for new trial in the District Court, can obtain review in this Court of his contention that the jury's award was inadequate.

2. Whether the evidence was sufficient to support the jury's award of damages.

3. Whether it was harmful error for the District Court to fail to give certain instructions relating to liability requested by the Plaintff where the jury found for the Plaintiff on the issue of liability.

4. Whether it was harmful error for the District Court to fail to give certain instructions relating to liability requested by the Plaintiff where the substance of the instructions were given in other charges.

5. Whether the District court abused its discretion in permitting the Plaintiff to be recalled for examination concerning inconsistent statements allegedly made by him following his previous testimony.

6. Whether evidence relative to a newspaper article which contained statements attributed to the Plaintiff inconsistent with his earlier testimony concerning damages was relevant.

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COUNTERSTATEMENT OF THE CASE

Preliminary

This is a libel action brought by Dr. William B. Shockley ("Shockley" or "Plaintiff") against Cox Enterprises, Inc.[1] ("Cox"), the publisher of *The Atlanta Constitution*, a daily newspaper, and Roger Witherspoon ("Witherspoon"), a writer for the newspaper (collectively the "Defendants"). Jurisdiction in the District Court was based upon diversity of citizenship. 28 U.S.C. §1332(a)(1). The suit involves a column in *The Atlanta Constitution* written by Witherspoon

[1] Pursuant to Rule 28.1, Cox Enterprises, Inc. does not have a parent company and the only subsidiary or affiliate, except wholly-owned subsidiaries, is Datex, Inc.

that was critical of theories and proposals concerning human genetics advanced by Shockley.

The case was tried before a jury. The Defendants' motion for a directed verdict was denied. After deliberating, the jury returned a verdict of one dollar against the Defendants. The Plaintiff appealed to the Court of Appeals for the Eleventh Circuit. The Defendants filed a cross-appeal from the denial of their motion for directed verdict. The Court of Appeals affirmed in a *per curiam* decision.

Counterstatement of the Facts

Dr. Shockley is a distinguished physicist who, along with two colleagues, received the Nobel Prize in physics for work in creating the transistor. (T.III, pp.10-11).[2] In later years, Dr. Shockley became interested in human genetics and eugenics (T.III, p. 19), although he has had no formal training in those fields. (T.III, p.61).

Shockley is persuaded that racial differences in measured intelligence are genetically determined. In particular, he has focused upon American blacks. As stated by him,

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[2] There has been no request for a certified copy of the record to be transmitted to this Court pursuant to S.Ct. R. 19. Citations will be made to the record before the Court of Appeals. The transcript of the evidence and proceedings is contained in seven volumes which are marked "Volume I" through "Volume VII," each of which is separately paginated. "T." followed by the appropriate volume number and page will be used to denote references to the transcript. "R." will be used to denote citations to Volumes 1 and 2 of the record which are paginated consecutively and contain the pleadings, motions, orders, etc. in the District Court.

> my research leads me inescapably to this opinion, namely that the major cause of the American Negroes' intellectual and social deficits is hereditary and racially genetic in origin, and that's not remediable to a major degree by practical improvements in environment. (T.II, pp.91-92).

Shockley is also convinced that genetically disadvantaged blacks are reproducing excessively. (T.II, pp.93-94). Shockley refers to his eugenics proposal for dealing with what he perceives to be a major social problem as the "voluntary sterilization bonus plan." Under this plan, a prospective parent who voluntarily submits to sterilization is paid $1,000 for each point that his or her I.Q. falls below 100. (T.II, p.98). Shockley belives that if his conclusions are adopted "no one will have done more than me to reduce misery for future generations of black Americans." (T.II, p.143). The following sentence has been used repeatedly by Dr. Shockley to describe the purpose of his contacts with the press:

> It is my intention to use members of the American press or communications media as the blocks or pulleys in the block and tackle. And the First Amendment is a rope or line upon which I shall endeavor to exert a force so to alter the position of the rudder of public opinion and turn the ship of civilization away from the dysgenic storm that I fear is rising over the horizon of the future. (T.II, p.134).

In the column which is the subject of this action, Witherspoon disagreed sharply with Shockley's views. Witherspoon's criticism was expressed in strong, unmistakable and caustic language.

At the trial, each side called several witnesses, including the parties, and various scientists and journalists. The Defendants presented evidence which, they contended, established that the statements in the column could not be the basis for a damage award under the principles established by this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).[3] Shockley presented evidence which, he contended, showed to the contrary.

With respect to alleged damages, there was abundant evidence from which the jury could infer that Dr. Shockley had not suffered any damages, or at most only minimal damages. For example, there was evidence that

—similar criticism of Shockley and his theories had appeared in the press over a period of years (T.III, pp.62-64, pp.117-21, pp.129, 132, and 134)

—only two persons in Dr. Shockley's home community in California had seen the column and Shockley had furnished the copies to them (T.II, pp.76-77)

—Dr. Shockley filed the suit because he sought to use the courtroom as a forum for enlightening the public about his theories (T.III, pp.186-187)

—during his pre-trial deposition, Dr. Shockley perceived his damages to be loss of time in interviews with Witherspoon that produced a

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[3] The parties stipulated that Dr. Shockley was a public figure within the meaning of the principles established in those cases.

> press item that he could not use to further his objectives; disillusionment about his capacity to appraise the objectivity and straightforwardness of newsmen; and loss of time in trying to find out if he had grounds for a suit. (T.III, pp.170-73).

During the presentation of Defendants' evidence, Dr. Shockley was recalled and examined, over objection on the ground of relevancy, about a newspaper article that appeared in *The Washington Post* after Shockley's testimony that attributed statements to him inconsistent with his testimony concerning damages. (T.VI, pp.139-46). Before commencing their deliberations, the jury was charged fully by the District Judge concerning the applicable principles of law, including those relating to "actual malice" required to fix liability in a libel action subject to the *New York Times* doctrine brought by a public figure plaintiff. (T.VII, pp.82-84, 103).

SUMMARY OF ARGUMENT

The Petition for Certiorari is essentially a restatement of the Plaintiff's brief in the Court of Appeals. The Petitioner does not allege, nor does the record indicate, that there are special or important reasons for review by this Court.

Even a cursory examination of each of the alleged errors demonstrates that the *per curiam* affirmance by the Court of Appeals was plainly correct.

REASONS WHY THE WRIT SHOULD BE DENIED

I. There are no Special or Important Reasons Why Certiorari Should be Granted in This Case.

The Petition for Certiorari to this Court is essentially a restatement of the Plaintiff's brief in the Court of Appeals. The alleged errors raised on appeal by the Plaintiff, which were disposed of by the Court of Appeals in a *per curiam* affirmance, dealt with run-of-the-mill questions relating to the weight of the evidence, the admission of evidence, the conduct of the trial, and requests to charge, typical of those which arise in the trial of any damage case. The Petition does not allege, nor is there anything in the record which would indicate in the remotest degree, that there are special or important reasons for review by this Court. The Petition does not suggest, for example, that the decision of the Court of Appeals is inconsistent with the decision of another federal court of appeals on the same matter, or that a federal question was decided in a way in conflict with a state court of last resort.

II. The Affirmance by the Court of Appeals was Correct with Respect to Each of the Questions Raised by the Petitioner.

A. The Alleged Inadequacy of the Jury's Damage Award is not Subject to Review Because Plaintiff Failed to File a Motion for New Trial.

The first reason for granting the writ advanced by Shockley is the alleged inadequacy of the damage award. Shockley may not obtain appellate review of this contention, however, because he failed to file a

motion for new trial in the District Court. It is well established that the grant or denial of a new trial on the ground of excessive or inadequate damages is a matter of discretion with the trial court, not subject to review except for grave abuse of discretion. And if the trial court is not given an opportunity to exercise its discretion on a motion for new trial, an appellate court has no basis for reviewing the trial court's exercise of discretion. *E.g.*, *Baker v. Dillion*, 389 F.2d 57 (5th Cir. 1968).

Even if a motion for new trial had been filed and denied, the evidence on the damage issue plainly would not justify a holding that there had been an abuse of discretion. Courts have upheld libel verdicts of six cents, *Eulo v. Deval Aerodynamics, Inc.*, 47 F.R.D. 35 (E.D. Pa. 1969), *aff'd in part and rev'd in part on other grounds*, 430 F.2d 325 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); one dollar, *Walkon Carpet Corp. v. Klapprodt*, 89 S.D. 172, 231 N.W.2d 370 (1975); *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78 (D.C. 1980), *cert. denied*, 451 U.S. 989 (1981); *Pridemore v. San Angelo Standard, Inc.*, 164 S.W.2d 859 (Tex. Civ. App. 1942); *Hooker v. Fort Worth Press Co.*, 11 S.W.2d 586 (Tex. Civ. App. 1928); two dollars, *Coats v. News Corp.*, 355 Mo. 778, 197 S.W.2d 958 (1946); and ten dollars, *Prichard v. Hunter*, 140 Colo. 92, 342 P.2d 666 (1959).

B. The District Court Did Not Err by Refusing to Give Certain Jury Charges on Liability Where the Legal Principles Were Already Adequately Covered by the Court's Instructions, and Particularly Where the Jury Decided in Favor of the Plaintiff on the Liability Issue.

Shockley contends that the District Court erred in refusing to give certain charges to the jury relating to liability. The jury, however, returned a verdict in favor of the Plaintiff on the issue of liability. Where a jury has resolved the issue of liability favorably to a plaintiff, the plaintiff cannot complain on appeal of alleged errors in the jury instructions on liability because any errors in the charges are harmless. *Wallace v. Ener*, 521 F.2d 215 (5th Cir. 1975); *Marlowe v. Garden Services, Inc.*, 411 F.2d 473 (5th Cir. 1969); *Fury Imports Inc. v. Shakespeare Co.*, 625 F.2d 585 (5th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981).

In addition, the instructions which the Plaintiff contends should have been given were covered substantially by other charges given by the District Court. (T.VII, pp. 82-84; 103). Federal courts have consistently held that a trial court's refusal to charge a legal principle in the exact words requested is not reversible error where the principle is adequately covered in other charges. *E.g., Allison v. Western Union Telegraph Co.*, 680 F.2d 1318 (11th Cir. 1982); *Corey v. Jones*, 650 F.2d 803 (5th Cir. 1981).

C. There Were No Errors In Relation to the Examination of the Plaintiff Concerning a Newspaper Article Which Attributed Statements to Him Inconsistent with his Testimony Concerning Damages.

After Shockley testified during the presentation of his case, an article appeared in *The Washington Post* which attributed statements to him inconsistent with his testimony in relation to damages. Shockley was recalled for examination by the Defendants during the presentation of their case. The Plaintiff objected on the ground of relevancy and on the further ground that the matter had been covered during Dr. Shockley's earlier examination. (T.VI, p. 143). Plainly the objections were without merit. The subject matter was relevant because it dealt with whether Dr. Shockley had suffered the damages he had claimed. *See, e.g., Morreale v. Downing*, 630 F.2d 286 (5th Cir. 1980); *Excel Handbag Co. v. Edison Brothers Stores, Inc.*, 630 F.2d 379 (5th Cir. 1980). It was also within the discretion of the District Court to permit Plaintiff to be recalled for examination in relation to matters that had arisen since his previous testimony. *See, e.g., United States v. Bibbs*, 564 F.2d 1165 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978); *Baron Tube Co. v. Transport Insurance Co.*, 365 F.2d 858 (5th Cir. 1966); *Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d 680 (5th Cir. 1971).

D. The Comments in the Petition Concerning the State of Libel Law Today are Cogent Reasons for Denial not Grant of the Writ.

In the Petition (pp. 21-24), Plaintiff quotes (without attribution) from an article that appeared in the *New*

York Times of September 29, 1985, written by Floyd Abrams, a lawyer and First Amendment scholar. One of the points made in the article is that the threat of large jury verdicts tends to deter open and critical discussion of important public issues. This conclusion in the article is, of course, diametrically opposed to Shockley's position in this case. Moreover, as reflected in a portion of the article quoted in the Petition (p. 23), a study indicates that libel plaintiffs "do not sue because they wish to obtain large monetary awards, but because they wish 'to restore their reputations or to punish the media.'" It is difficult to fathom how this finding, which is apparently endorsed by Plaintiff, furthers his position in this case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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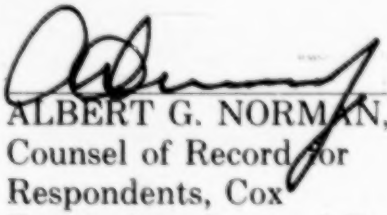
CERTIFICATE OF SERVICE

I, Albert G. Norman, Jr., counsel of record for the Respondents, Cox Enterprises, Inc. and Roger Witherspoon, and a member of the Bar of this Court, hereby certify that I have this day served three (3) copies of the foregoing Brief of Respondents in Opposition to Petition for a Writ of Certiorari, by depositing the same in a United States Mailbox, with first-class postage prepaid, addressed to counsel of record for the Petitioner, William B. Shockley, as follows:

Mr. Murray M. Silver
c/o Murray M. Silver, P.C.
Omni International
Suite 700, South Tower
Atlanta, Georgia 30303

This 24th day of December, 1985.



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